

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 30, 2005 Session

**HARLAN B. EMBRY v. UNITED PARCEL SERVICE, INC., LIBERTY
MUTUAL FIRE INSURANCE COMPANY, and the ADMINISTRATOR OF
THE TENNESSEE SECOND INJURY FUND**

**Direct Appeal from the Chancery Court for Davidson County
No. 03-825-IV Hon. Richard Dinkins, Chancellor**

**No. M2004-02395-WC-R3-CV - Mailed - April 28, 2006
Filed - May 31, 2006**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Employee has appealed the findings of the trial court, which determined that the Employee is entitled to recover benefits for a permanent partial disability rating of 12.5% apportioned to the right upper extremity and no disability to the left upper extremity, both cubital tunnel injuries. The trial court also found no compensable injury accorded to the Employee's claim for benefits due to his bilateral carpal tunnel syndrome. Further, the Employee appeals from the failure of the trial court to award discretionary costs to him pursuant to the provisions of Rule 54.04 of the Tennessee Rules of Civil Procedure. Finally, the Employee has asked the Panel to consider post-judgment facts and render a decision with regard to interest. We hold that the judgment should be affirmed in part, reversed in part, and remanded.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right;
Judgment of the Chancery Court is Affirmed in Part, Reversed in Part, and Remanded.**

ROBERT E. CORLEW, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and WILLIAM H. INMAN, SR. J., joined.

Keith Jordan, Nashville, Tennessee (on appeal), and Joseph L. Mercer, III, Nashville, Tennessee (at trial), for the Appellant, Harlan B. Embry.

David T. Hooper, Hooper & Zinn, Brentwood, Tennessee, for the Appellees, United Parcel Service, Inc. and Liberty Mutual Fire Insurance Company.

Richard M. Murrell, Nashville, Tennessee (on appeal), and William G. Calhoun, Nashville, Tennessee (at trial), for the Appellee, Administrator of the Tennessee Second Injury Fund.

MEMORANDUM OPINION

The issues before the Panel in this cause are whether the trial court awarded a sum which is sufficient for a cubital tunnel injury¹, and whether the trial court properly found that the Employee suffered temporary injuries, but no permanent injury, as a result of bilateral carpal tunnel syndrome. Compensability of the claims is undisputed. The Appellant, Harlan B. Embry (hereinafter "Employee") was employed by United Parcel Service, Inc. (hereinafter "Employer") and was working within the course and scope of his employment at the time the gradual injuries, at issue in this case, occurred. Notice was timely given, and medical treatment was provided. Payments of temporary disability were paid, and the compensation rate is stipulated.

The Employee was forty-nine years of age at the time of trial. He attended four years of high school and completed a program in automobile mechanics, though the Employee testified that he did not receive an academic diploma. He worked in various labor-intensive jobs, primarily doing mechanic work with his hands before beginning work for the Employer in 1988. He continued performing labor-intensive duties, while working for the Employer. The Employee referenced his job description during his testimony which provided that he was required to lift up to 150 pounds and to perform repetitive grasping. After the injuries about which the Employee complains in this case occurred, he was unable to return to work for the pre-injury employer, due to work-related restrictions. He sustained prior work-related injuries including an injury to his hips in 2000, resulting in a 68% vocational disability rating. In 1986 he injured his right knee at work, sustaining 10% vocational disability apportioned to the leg. While working for this Employer he also sustained a back injury and a hernia injury, for which he did not receive awards of permanent vocational disability. He suffers from hypertension for which he takes medication, and, at the time of trial, he was taking anti-anxiety medication and anti-depressants.

In the summer of 2002, the Employee noted symptoms which were later diagnosed as carpal tunnel syndrome. On March 31, 2003, he was first seen by Dr. Michael LaDouceur, a physician approved by the Employer. Dr. LaDouceur performed an examination and diagnosed the Employee with bilateral severe carpal tunnel syndrome and right-sided cubital tunnel syndrome. On April 10, 2003, Dr. LaDouceur performed a carpal tunnel release and a cubital tunnel release on the Employee's right arm. After the surgery, Dr. LaDouceur noted some decreased range of motion which he found to be "consistent with his postoperative change."

The Employee then began a course of physical therapy at Dr. LaDouceur's direction, though the Employee asserted that the physical therapy did not yield positive results. The Employee continued to complain of persistent numbness in his middle finger and initially had some slight

¹The terms "cubital tunnel syndrome" and "ulnar neuropathy" or "ulnar nerve entrapment" are used interchangeably by the physicians in this case, and in this opinion.

decreased range of motion at the wrist, which again Dr. LaDouceur found to be consistent with the Employee's post-operative recovery. Some continued elbow pain was also noted, but Dr. LaDouceur testified that "some hypersensitivity, increasing pain, tingling, shooting sensations, [are] very common with nerve recovery." Because of the Employee's continued symptoms of pain, however, Dr. LaDouceur ordered a further electrodiagnostic study. Dr. LaDouceur found that the tests performed four months post-right arm surgery continued to demonstrate that "carpal tunnel was still present but it was improved compared to his preoperative condition, and that he still was demonstrating signs of ulnar nerve entrapment on the right side as well."

Similar releases were performed on the left arm on June 5, 2003. The Employee experienced less middle finger numbness on his left hand and limitation of range of motion of his left hand and wrist initially, which Dr. LaDouceur again found to be normal post-surgery. The Employee reported very few problems with his left arm.

The Employee ultimately reached maximum medical improvement on November 12, 2003 as to all injuries, after a functional capacities evaluation was performed. Dr. LaDouceur opined that the Employee sustained no impairment as to the carpal tunnel injuries or the left cubital tunnel injuries. He opined that the Employee sustained 5% permanent impairment to his right arm as a result of the cubital tunnel injury. Dr. LaDouceur placed permanent work restrictions on the Employee including limitations on lifting, carrying, pushing, and pulling, consistent with the functional capacities evaluation. These restrictions applied to both left and right arms. He testified that he found no impairment due to the severe carpal tunnel syndrome because the nerve conduction studies "demonstrated improvement compared to his preoperative condition" and because "his residual symptoms could be related to his cervical radiculopathy." Dr. LaDouceur further noted that the loss of sensation which the Employee experienced in his right middle finger was in "the upper range of normal."

Dr. LaDouceur also found that the Employee had sustained a cervical injury, but it was his opinion that the cervical problem was degenerative and not work-related, and there is no evidence of any treatment for that condition. Dr. LaDouceur did attribute some of the residual symptoms suffered by the Employee to the untreated cervical problem. It was Dr. LaDouceur's opinion that the continued decreased sensation that the Employee experienced in his right middle finger "could be related to his cervical radiculopathy or it could be related to his carpal tunnel."²

²Dr. LaDouceur ordered a magnetic resonance imaging test (MRI) to be performed on the Employee's back. This was performed on September 3, 2003, some three months post-left arm surgery and some five months post-right arm surgery. The report was made Exhibit 8 to Dr. LaDouceur's deposition, and provides the following findings:

The cervicomedullary junction is normal. There is a mild posterior bulge of the C5-6 intervertebral disc. This compresses the anterior surface of the thecal sac but does not abut or compress the cervical cord. There is an anterior bulging disc at this level as well with mild anterior spurring of the inferior endplate of C5. Remainder of the intervertebral disc levels appear normal. The cervicomedullary junction is normal.

The Employee saw Dr. Walter Wheelhouse on one occasion for an independent medical evaluation. He agreed with Dr. LaDouceur that the Employee suffered no permanent injury as a result of his left cubital tunnel injury, and he found that the Employee sustained only 4% permanent anatomical impairment as a result of the right cubital tunnel injury, contrasted with 5% determined by Dr. LaDouceur. Dr. Wheelhouse opined, however, that the Employee suffered a permanent injury to each arm as a result of the carpal tunnel injury, and he opined that the Employee sustained 5% anatomical impairment to each arm as a result of these injuries. Dr. Wheelhouse noted the fact that Dr. LaDouceur's pre-operative diagnosis of the Employee was *severe* carpal tunnel syndrome, and he noted the existence of post-operative symptoms which the Employee continued to experience. He referenced both the pre-operative electrodiagnostic study and the post-operative electrodiagnostic study performed by Dr. Sahn-Ren Zhou, at the direction of Dr. LaDouceur. He noted post-operative positive Tinel's sign, Phalen's sign and positive carpal compression tests on the Employee's right arm, and positive post-operative Tinel's sign on the Employee's left arm. He testified further as to residual symptoms, and addressed his opinion that the loss of sensation which the Employee experienced in his right middle finger was abnormal and indicative of anatomical impairment rather than in "the upper range of normal," as Dr. LaDouceur opined.

The Employee further testified as to his post-operative condition. He testified that his right arm begins to throb at night and disturbs his sleep. He addressed the loss of sensation in his right middle finger, stating that "the end of the finger is just totally dead." He testified that his left arm causes many fewer problems, and mainly causes discomfort when he drives an automobile. He testified that his hand and fingers become numb. His lifting with both hands is restricted. He explained that his spouse suffers from disabilities, and he is able to do the housework, to include vacuum cleaning the floors and making beds. The Employee explained that he was not able to return to work for the Employer due to his restrictions. He attempted, unsuccessfully, to have his restrictions lifted so he could return to work for his pre-injury Employer. He further testified that he had applied to a small number of other employers since his termination but had not been hired.

STANDARD OF REVIEW

Our review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Conclusions of law established by the trial court come to us without any presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003).

ANALYSIS

The trial court determined that the Employee sustained no permanent injury as a result of the carpal tunnel problems, as Dr. LaDouceur opined, but awarded 12.5% vocational disability to the Employee for his right cubital tunnel injury, apportioned to the arm. The Employee moved post-trial for discretionary costs pursuant to the provisions of Rule 54.04 of the Tennessee Rules of Civil Procedure, but the trial court never considered the request.

We have recognized that the workers' compensation laws should be "liberally construed to promote and adhere to the [purposes of the Workers' Compensation] Act of securing benefits to those workers who fall within its coverage." *Martin v. Lear Corp.*, 90 S.W.3d 626, 629 (Tenn. 2002). Nonetheless, the burden of proving each element of his cause of action rests upon the employee. *Cutler-Hammer v. Crabtree*, 54 S.W.3d 748, 755 (Tenn. 2001). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004); *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

The trial court determined that the opinions of the expert witnesses were such that only one opinion could be accepted. The trial court accepted the opinion of Dr. LaDouceur, placing great emphasis on the fact that Dr. LaDouceur was the treating physician while Dr. Wheelhouse saw the Employee only a single time for purposes of independent medical evaluation. The trial court found Dr. LaDouceur to be "an experienced practitioner" and emphasized the fact that Dr. LaDouceur performs three to twenty carpal tunnel surgeries per month. The court also cited discrepancies which it found in Dr. Wheelhouse's testimony compared with his written report.³

The trial court heard the testimony of the Employee, two of the Employee's co-workers, and the company representative for the Employer. With respect to this testimony, the trial court had the opportunity to determine the credibility of these witnesses based upon their demeanor and appearance in person before the Court. When the trial court has observed the witnesses and heard their testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's findings. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the testimonies of both Dr. Michael LaDouceur and Dr. Walter Wheelhouse were presented by deposition. When the medical proof is presented by deposition, we must determine the weight to be given to the expert testimony and draw our own conclusions with regard to the issues of credibility with respect to the expert proof. *E.g., Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Elmore v. Traveler's Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992).

CUBITAL TUNNEL INJURIES

After considering all of the evidence, we agree with the trial court that there is no evidence of a permanent injury to the Employee's left arm as a result of his cubital tunnel injury, despite the fact that a surgical release was performed. We further agree with the trial court that the Employee suffered an injury as a result of a cubital tunnel injury to his right arm, and we agree that 12.5% is an appropriate vocational disability rating apportioned to the arm for this injury.

³ Significant issues were raised by counsel for the parties concerning omissions or errors in both doctors' medical reports. The trial court noted two reasons for discrediting Dr. Wheelhouse's opinion: 1) he saw the Employee only once, and 2) "inconsistencies between Dr. Wheelhouse's records and his testimony introduced at trial, which inconsistencies directly relate to the impairment rating assigned by Dr. Wheelhouse."

CARPAL TUNNEL INJURIES

We disagree, however, that the Employee suffered no permanent injury as a result of the bilateral carpal tunnel issues. We have considered the expert opinions of both physicians, the medical evaluations exhibited to the treating physician's testimony upon which he testified that he relied, and the lay testimony. After considering all of the evidence, we find that the Employee has sustained a permanent injury to each of his arms as a result of his carpal tunnel injuries. We reach this conclusion for several reasons. The Employee's condition was not a mild carpal tunnel injury which could be treated without surgery. A bilateral surgical release was required. Though the surgical procedures were of benefit to the Employee, the lay testimony of the Employee shows that he is not symptom-free after the surgery. Further, post-surgery tests showed the Employee experienced reduced light touch sensory loss and reduced protective sensation and abnormal two-point discrimination. He did not enjoy normal sensibility, and tests measuring nerve conduction and opposition strength were abnormal. Further, both expert witnesses testified that work restrictions should be assigned to the Employee. The preponderance of evidence supports a finding that the Employee sustained a small percentage of anatomical impairment apportioned to each arm. Upon review of the evidence, we find that the Employee has sustained only 1% anatomical impairment apportioned to the left arm. The carpal tunnel injury to the right arm is more substantial, and we find that a 3% anatomical impairment rating is appropriate for this injury.

Having found the carpal tunnel injuries compensable, and noting that the trial court made no alternative findings of the percentage of vocational disability for the Employee's carpal tunnel syndrome, it is our duty to remand the cause to the trial court for consideration of this issue. *See e.g., Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 916-17 (Tenn. 1999). In this case, the Employee's previous workers' compensation awards total 73% to the body as a whole. The issue of the liability of the Second Injury Fund is dependant upon whether the Employee retains greater than 100% permanent and total disability for his cumulative injuries. Tenn. Code Ann. § 50-6-208. Because the amount of vocational disability sustained for the Employee's carpal tunnel injuries affects this determination, we also remand the issue of the liability of the Second Injury Fund, including any apportionment of liability accorded to the Fund, to the trial court. *Id.*

INTEREST AND DISCRETIONARY COSTS

The Employee seeks our award of the interest upon the judgment. We agree with the Employee that the Employer is liable for interest in accordance with the workers' compensation law from the date of the judgment of the trial court. Tenn. Code Ann. § 50-6-225(h)(1); *Eddlemon v. Tecumseh Products Co.*, 101 S.W.3d 57, 59 (Tenn. Workers Comp. Panel 1999). The law provides that the Employer is liable for interest not only upon the judgment rendered by the trial court, but is also liable for interest on the judgment we render, retroactively applied to the date of the judgment entered by the trial court, as though the trial court had rendered judgment for the entire amount of our judgment. Tenn. Code Ann. § 47-14-121. *See also Alloway v. City of Nashville*, 13 S.W. 123,127 (Tenn. 1890). We agree with the Employer, however, that the calculation of that interest is a matter in the sound discretion of the trial court. We recognize that the matter of interest is one

which was not presented to the trial court, and, our jurisdiction being appellate, we must remand to the trial court for determination of this issue.

The Employee also asks us to determine the issue of discretionary costs pursuant to Rule 54.04 of the Tennessee Rules of Civil Procedure. Again, it appears to us from the record that, although the Motion for Discretionary costs was filed, it was never argued to the trial court and never set before the trial judge. Rule 54.04 contemplates a decision by the trial court, and provides that the "trial court retains jurisdiction over a motion for discretionary costs even though a party has filed a notice of appeal." *Id.* We have reviewed the Motion which was filed before trial, and we have recognized that, generally, it is proper to award the costs of the "reasonable and necessary expert witness fees for depositions," and "reasonable and necessary court reporter expenses for depositions or trials." *Id.* Nonetheless, this also is an issue where the trial court has jurisdiction to consider the Motion. In addition to raising these issues in this appellate brief, the Employee filed a Motion to Consider Post-Judgment Facts. Because we choose to remand these issues for determination by the trial court, we deny that Motion. All relevant facts may be presented to the trial court.

CONCLUSION

We affirm the trial court's finding that the Employee has sustained a 12.5% vocational disability rating to his right arm due to his cubital tunnel injury, and that the cubital tunnel injury to his left arm is not a compensable injury. We reverse the trial court's finding that the Employee sustained no permanent injury to his arms due to his carpal tunnel injury. We affirm the decision of the trial court that payments as a result of these injuries should not be commuted, but that all accrued benefits should be paid in a lump sum. We remand this cause to the trial court for determination of the percentage of vocational disability to which the Employee is entitled for his carpal tunnel injury, for consideration of the issue of post-judgment interest, and for consideration of the award of discretionary costs.

The costs on appeal will be taxed against the Employer.

ROBERT E. CORLEW, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
NOVEMBER 30, 2005 Session

**HARLAN B. EMBRY v. UNITED PARCEL SERVICE, INC., LIBERTY
MUTUAL FIRE INSURANCE COMPANY, and the ADMINISTRATOR OF
THE TENNESSEE SECOND INJURY FUND**

**Chancery Court for Davidson County
No. 03-825-IV**

No. M2004-02395-WC-R3-CV - Filed - May 31, 2006

JUDGMENT

This case is before the Court upon the motion for review filed by pursuant to Tenn. Code Ann. §50-6-225(e)(5)(b), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting for its findings of fact and conclusions of law..

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed against the Employer, and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM